STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Fitzgerald, P.J., and Zahra and Fort Hood, JJ.)

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS ex rel BERNETTE
BURNSIDE,

Claimant-Appellee,

vs.

FASHION BUG OF DETROIT, INC.,

Respondent-Appellant.

Supreme Court No. _____

Court of Appeals No. 240325

Wayne Circuit No. 01-116726-AA

MDCR No. 122300-EM06

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REPLY BRIEF IN SUPPORT OF RESPONDENT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT IN REPLY

After consideration of Ms. Burnside's response to Fashion Bug's application for leave to appeal, one might believe this is a fact-intensive case. It is not. There is no real dispute regarding the "who, what, how, when and where" of Ms. Burnside's termination from Fashion Bug. The outcome is not dependent on the resolution of credibility issues. The real question is whether the record, as it exists, supports the conclusion that Fashion Bug's decision to terminate Ms. Burnside's employment was motivated by unlawful discriminatory animus.

From day one, Fashion Bug has consistently explained that it terminated Ms. Burnside for attempting to violate its employee-return policy. Nothing in the record supports a conclusion that *Fashion Bug* ever harbored discriminatory animus toward Ms. Burnside. The hearing referee, the only person who actually heard and saw witnesses, understood this and ruled in Fashion Bug's favor. The dissenting member of the Michigan Civil Rights Commission ("MCRC") likewise understood this, and accordingly reached the same conclusion as the hearing referee. Nevertheless, because an MCRC majority and the lower courts have *(a)* misread the record and *(b)* misunderstood the law, Fashion Bug now stands liable for racial discrimination where none occurred. This is a miscarriage of justice and a matter of great concern to Fashion Bug.

For purposes of this appeal, there are only three "facts" of consequence.

First, it is clear from the record that Ms. Burnside and Ms. Jawoszek could not have been accused of violating "the same company policy." The only company policy at issue was Fashion Bug's employee-return policy, which did not extend to returns by ordinary customers. As explained in Argument "B" of Fashion Bug's application for leave: *(a)* Only Ms. Burnside was accused of violating (or attempting to violate) the

employee-return policy; *(b)* the purported incident between Ms. Jawoszek and Benita Withers did not involve an employee return; and *(c)* nothing in the employee-return policy—or any other company policy for that matter—precluded Ms. Jawoszek from refusing to accept a customer return without a receipt. A review of the testimony cited on pp. 13-15 of *Ms. Burnside's* response brief in this Court (which is presumably the "best" evidence supporting her position) confirms that the employee-return policy did not extend to non-employees and that returns by non-employees were generally accepted without a receipt as a matter of "good customer service." No testimony suggests that Fashion Bug ever had a policy forbidding store managers from refusing merchandise returns absent a receipt. Accordingly, there is no evidence that Ms. Jawoszek was ever accused of "violating" any "policy." As a result, Ms. Burnside and Ms. Jawoszek were not even remotely close to being "similarly situated."[1]

The Court of Appeals erred in failing even to consider Fashion Bug's argument on this point. Inexplicably, it concluded that Fashion Bug did not "challenge" the circuit court's "findings" that "both [Burnside] and Jawoszek were accused of violating the same company policy regarding returns and exchanges."[2] (Court of Appeals slip op., p. 2.) Notwithstanding the argument on page 25 of Ms. Burnside's response brief (which does not address the question whether the record supported the trial court's "same policy" finding), it is clear that the Court of Appeals—having wrongly announced that Fashion

[1] Although Ms. Burnside asserts in her response brief that she need only be shown to have been similarly situated to Ms. Jawoszek in "all relevant respects" (as opposed to being similarly situated in *every* conceivable respect), see *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (6th Cir, 1998), the fundamental differences between Ms. Burnside's situation and Ms. Jawoszek's situation with respect to the employee-return policy are certainly relevant here.

[2] A copy of the pages of Fashion Bug's Court of Appeals brief challenging these findings is attached hereto as Exhibit 1.

Bug did not "challenge" the circuit court's findings—never questioned whether there was any actual support in the record for the trial court's conclusion that Ms. Burnside and Ms. Jawoszek were accused of violating the same company policy. (See Court of Appeals slip op, pp 2-3.) Fashion Bug is entitled to have this argument resolved on appeal.

The second factual matter of note is the question whether Ms. Burnside *actually* violated (or attempted to violate) Fashion Bug's employee-return policy. This issue is noteworthy because, though *wholly irrelevant* to the question whether Fashion Bug actually harbored discriminatory animus toward Ms. Burnside, it provided the basis for the Court of Appeals panel's conclusion that Fashion Bug's proffered reason for terminating Ms. Burnside's employment was a pretext for unlawful discrimination. (See Argument "C" of Fashion Bug's application for leave to appeal.) Although *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998), stands for the proposition that a proffered reason for an adverse employment decision can be shown to be pretextual if *the reason itself* (*i.e.*, the explanation) has no basis in fact, it does *not* stand for the proposition that an employer, acting in good faith, upon a race-neutral—albeit erroneous—belief is liable for unlawful discrimination. This unwarranted expansion of *Feick* takes the emphasis away from an employer's motive (where it belongs) and focuses undue attention on the accuracy of the employer's beliefs.

This is an important issue because, as pages 5-6 of Ms. Burnside's response brief demonstrate, it is easy to misread *Feick*. Both the Court of Appeals and Ms. Burnside have done so. The bench and bar would benefit from an opinion, either per curiam or on leave granted, clearly stating that the factual inaccuracy of an employer's stated, race-neutral belief is not relevant to the question whether the employer's proffered reason for

an adverse employment action is a pretext for unlawful discrimination. The relevant question—to which the *Feick* language was directed—is whether the *proffered reason* for the discharge was, in fact, the *actual reason* for the discharge. Contrary to Ms. Burnside's argument and the Court of Appeals errant conclusion, the *accuracy* of the employer's good faith belief should play no role in this analysis. See *Hazle v Ford Motor Co*, 464 Mich 456, 476 628 NW2d 515 (2001) ("A plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."). In other words, an employer is entitled to be "wrong," so long as it is wrong in good faith.

Third, it is undisputed that Ms. Jawoszek had no authority to terminate Ms. Burnside's employment and did not participate in the decision to do so. Nothing in the record supports a contrary conclusion. And Ms. Burnside does not even attempt to argue that Ms. Jawoszek took part in the decision to terminate her employment. Instead of defending the Court of Appeals panel's dubious conclusion that Jawoszek's allegedly prejudiced remarks were relevant to show discriminatory racial animus on the part of Fashion Bug because Jawoszek was an "agent" of Fashion Bug, Ms. Burnside attempts to sidestep the issue with a misguided procedural argument.[3]

The fact is that no logical reason—and no legal authority—exists to support the Court of Appeals dubious conclusion that the racial attitudes of the person *reporting* an allegation of misconduct (in this case, Ms. Jawoszek) are relevant to the motives behind

[3] Ms. Burnside argues on p. 6 of her response brief that "Fashion Bug did not even allege that the Trial Court's consideration of Ms. Jawoszek's comments was clear error." This assertion is puzzling, given Argument "D" in Fashion Bug's application for leave to appeal.

the employer's subsequent action where the reporter is not involved in the decisionmaking process. The law is clear that a remark made by another employee with no "decisionmaking authority regarding the discharging" of the plaintiff is *not relevant* to discerning the employer's motive. See *Krohn v Sedwick James of Michigan, Inc.*, 244 Mich App 289, 300; 624 NW2d (2001). Being a mere "agent" of the employer—as *all* employees are—is simply not enough. Accordingly, the Court of Appeals conclusion on this point was clearly erroneous, and just one more reason why this case falls squarely within the definition of a "miscarriage of justice."

Finally, it is worth noting that Ms. Burnside's new "changing rationales" argument is without merit. Relying on *Cicero v Borg-Warner Automotive, Inc*, 280 F3d 579 (6th Cir 2002), for the proposition that changing rationales for discharge is evidence of pretext, Ms. Burnside attempts to make a showing of pretext based on (1) Ms. Jawoszek's initial accusation that Plaintiff was getting "smart" with her, (2) testimony from Store Manager Elaine Landolfe that Ms. Burnside "quit" before she could be discharged, and (3) defense counsel's argument that Ms. Burnside was discharged for violating or attempting to violate company policy.

These three items do not amount to "changing rationales" for Ms. Burnside's discharge. The first item, Ms. Jawoszek's accusation, has nothing to do with Ms. Burnside's discharge because it is undisputed that Ms. Jawoszek had no involvement in the decision to discharge Ms. Burnside and there is no evidence that Fashion Bug ever claimed that it was terminating Ms Burnside for "getting smart" with Ms Jawoszek. The second item, Ms. Landolfe's testimony, has nothing to do with the *reason* for Ms. Burnside's separation from Fashion Bug, but instead speaks to only the timing and

circumstances of Ms. Burnside's departure from the store on her final day of work (*i.e.*, whether she left before Fashion Bug could officially tell her that she was going to be terminated).

The third item, defense counsel's explanation that Ms. Burnside was terminated for violating (or attempting to violate) Fashion Bug policy, is consistent with the testimony of Regional Supervisor Deborah Kerins regarding the reason for Ms. Burnside's termination. Ms. Kerins testified that on October 18, 1991, she met with Ms. Burnside and Ms. Landolfe in the back room at Burnside's Fashion Bug store. (Appendix G, Hearing Transcript, pp 441-442.) Ms. Kerins had talked with Ms. Jawoszek and reviewed the statements of the Warren Store employees before the meeting. (Appendix G, pp 435, 474.) Based upon the circumstances, Ms. Kerins had decided that termination seemed appropriate given Ms. Burnside's apparent attempt to return items without a receipt, despite Fashion Bug's policy to the contrary. (Appendix G, pp 438-439, 444, 462.) Ms. Kerins had, on other occasions, terminated employees for a similar reason. (Appendix G, p. 471.) Ms. Kerins began the meeting by asking Burnside about the return policy, and then started to get into the specific incident. The conversation became heated, at this point, with Ms. Burnside getting up and leaving the store. (Appendix G, p. 445.)

In sum, Fashion Bug has never given any reason for terminating Ms. Burnside's employment other than her attempt to return merchandise without a receipt. Ms. Burnside cannot show that Fashion Bug ever gave a different reason for terminating Ms. Burnside's employment. Accordingly, there is no basis for Ms. Burnside's new argument that pretext can be found based on Fashion Bug's changing rationales.

CONCLUSION & RELIEF REQUESTED

Fashion Bug is aware that the Michigan Supreme Court is not, primarily, an error-correcting court. As set forth above, this case is about more than mere error correction. The Court of Appeals' (and Ms. Burnside's) misunderstanding of the somewhat-confusing "no basis in fact" language from *Feick*, *supra* at 343, demonstrates the need for an opinion clarifying that the important "fact" is whether the employer's *proffered reason* was, in fact, the *actual reason*—not whether the employer's good faith belief about the employee's conduct was, in fact, accurate. The goal of the Civil Rights Act, MCL 37.2101 *et seq.*, is to protect all employees from discriminatory motives—not to shield minority employees from race-neutral decisions, made in good faith, that happen to be based on factually erroneous beliefs. See *Hazle*, *supra* at 476. If read in the manner urged by Ms. Burnside and adopted by the Court of Appeals panel below, *Feick* and the other Court of Appeals cases using the "no basis in fact" language undermine this fundamental principle of civil rights law. Accordingly, this Court may wish to issue an opinion clarifying the potentially confusing language of *Feick*, *supra*. Ms. Burnside's evidence that she did not *in fact* violate the company policy did not constitute valid evidence of pretext.

This case is also about more than mere "error correction" because of its serious subject matter and the nature and number of errors made by the lower courts and tribunals. As much as a victim of racial discrimination suffers a miscarriage of justice when the discrimination goes without a remedy, so too does a person or entity wrongly accused of engaging in unlawful racial discrimination. In this case, as a result of a series of erroneous legal conclusions reached by a Civil Rights Commission majority, the

Wayne County Circuit Court and the Court of Appeals, Fashion Bug has been found liable for race discrimination without any reliable evidence that it ever harbored any discriminatory animus towards Ms. Burnside. Moreover, despite the Court of Appeals order granting Fashion Bug's application for leave to appeal, the Court of Appeals *never even addressed* Fashion Bug's argument that the record did not support the circuit court's conclusion that Ms. Burnside and Ms. Jawoszek were "similarly situated." The numerous clear errors committed by the Court of Appeals require a remedy from this court of last resort.

Accordingly, Fashion Bug asks for relief in the form of (i) an order granting Fashion Bug's application for leave to appeal, (ii) an order peremptorily reversing the Court of Appeals decision, (iii) a per curiam opinion reversing the Court of Appeals, or (iv) an order remanding the case to the Court of Appeals with instructions to address the issue left unresolved in its initial opinion. In rendering such relief, this Court may also wish to adopt as its own the recommendations of the hearing officer and/or the dissenting member of the MCRC.

Respectfully submitted,

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